No. 81-2042

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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SUPREME COURT, U.S.

STATE OF MICHIGAN,

Petitioner,

v.

MID-LOUISIANA GAS COMPANY, et. al.,

Respondents.

ON WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF THE STATE OF MICHIGAN TO MOTIONS FOR DIVISION OF ORAL ARGUMENT

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December 22, 1982

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Frank J. Kelley, Attorney General of the State of Michigan, for and on behalf of the State of Michigan (Michigan), hereby responds to the motions for division of oral argument previously filed herein.

This matter is on writ of certiorari granted October 4, 1982 to review a decision of the Court of Appeals for the Fifth Circuit. This case was consolidated with others filed by the Federal Energy Regulatory Commission (FERC) (82-19), the Public Service Commission of the State of New York (NYPSC) (81-1889), and the Arizona Electric Power Cooperative, Inc. (AEPCO) (81-1958). These consolidated cases all involve the FERC's interpretation of the Natural Gas Policy Gas Act of 1978, 15 U.S.C. 3301 (20), (21) as excluding pipeline production from the terms thereof.

The NYPSC and AEPCO both filed motions to divide oral argument in these consolidated cases, dated December 13, 1982. However, divided argument is not favored and only one counsel shall be heard for each side, except by special permission. U.S. Sup Ct. Rule 48.4. While expressing no position on the motions for divided argument in cases 81-1889 and 81-1958, Michigan wishes to advise the Court that we do not believe that our case, No. 81-2042, involves such extraordinary circumstances as to require divided argument. Accordingly, Michigan relinquishes to the federal government whatever time for oral argument the state is entitled to, or becomes entitled to as a result of any divided argument.

WHEREFORE, Michigan respectfully requests that this Court designate the representative of the federal government as counsel to present oral argument for Petitioners.

Respectfully submitted,

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a. **Language And Structure Of The Act.**

Section 2(21) defines "first sales" as follows:

> (A) GENERAL RULE.—The term "first sale" means any sale of any volume of natural gas—
>
> (i) to any interstate pipeline or intrastate pipeline;
>
> (ii) to any local distribution company;
>
> (iii) to any person for use by such person;
>
> (iv) which precedes any sale described in clauses (i), (ii), or (iii); and
>
> (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act.
>
> (B) CERTAIN SALES NOT INCLUDED.—Clauses (i), (ii), (iii), or (iv) or subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

At the very outset, the face of the statute reflects a general rule that pipeline sales are not "first sales." Indeed, the provision broadly excepts "the sale of any volume of natural gas by an interstate pipeline, * * *" except where the sale is "attributable to" gas produced by the pipeline.

Pipelines argue that when they make a "sale" of mixed gas (say 70% produced by others and 30% produced by the pipeline company itself), the "sale" is somehow "attributable to" volumes produced by the pipeline. The Commission disagreed, holding that the "sale" meant the whole of the sale and not some part of it. This result is plainly consistent with the face of the statute. Congress did not say "that portion of the sale" or a "pro rata share of the sale." As the Commission explained, in rejecting the argument that the "plain meaning" somehow entitled the pipelines to NGPA prices (R. 3281), Congress simply said "the sale." On its face, the phrase "the sale" means all of the sale, not part of it.

The pipelines who claim to rely on the "plain meaning" rule now argue that the statute must be read as though it said "the pro rata portion of the sale attributable to" their own gas. But if there is any "plain meaning," it lies in the actual words ("the sale"), not in some limiting phrase which the pipelines think the Congress should have added.

The soundness of the Commission's construction is also shown by the fact that all of the NGPA "first sale" prices appear in Title I, Subtitle A (15 U.S.C. §3301, *et seq.*). Congress called that title "WELLHEAD PRICING" and the subtitle "Wellhead Pricing Controls." The term "wellhead" generally refers to sales made in the field by producers to pipelines. *E.g., Shell Oil* v. *FPC*, 520 F.2d 1061, 1065 (5th Cir. 1975) ("the price paid to the producer at the wellhead for natural gas. • • • wellhead sales of natural gas by independent producers, • • •.").

The statute's language and form thus generally link "first sale" with "wellhead prices." Statutory titles can furnish "strong evidence" of Congressional intent, *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 375, 413 (1975), and they legitimately aid here. The Commission properly concluded that

the statutory pricing scheme reflected "a distinction between a pipeline['s] • • • producer or field sales and other sales that remain subject to Commission or state jurisdiction" (R. 3280).

To be sure, a "first sale" need not ineluctably occur at the wellhead. See *supra*, p. 17. But certainly a construction which holds, as here, that general sales from pipeline systems throughout the country are not "first sales," is plainly consistent with contours of the Act which established "Wellhead Pricing" or "Wellhead Price Controls."

If there is any "plain meaning" in these statutory provisions, it is not the one which the pipelines urge—a construction which reads the word "sale" as though it said "part of a sale," and ignores the fact that the relevent parts of the Act are entitled "wellhead" pricing. Nothing in the legislative history warrants this cavalier approach to the language of the Act.

Under any view, the concept of "first sale" is by no means so clear as to command the pipelines' literal reading which covers almost any sale. As we show, *infra*, the term "first sale" was new; even experts did not know what it meant; and the Congress itself struggled to define and then redefine it.

b. **Legislative History.**

The term "first sale" is new to federal regulation of gas. In the first hearings on the forerunner of the NGPA, counsel to the House subcommittee conducting those hearings stated that he believed that the term was "foreign to traditional Natural Gas Act" regulation. Two former FPC General Coun-

sels and the then incumbent agreed.[7] The Congress itself started with "first sale" undefined, and then drafted two successive definitions.[8] The Commission thus came to the term without any explicit command from the past, and its construction should be accorded particular significance because the traditional deference "is heightened when, as here, the interpretation is of a new statute by its implementing agency." *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 31, note 64 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 426 U.S. 941.

As shown, *supra*, the "first sale" for pricing purposes is linked directly by the statutory titles and subtitles to concepts of "wellhead pricing" and "wellhead price controls." This gloss on "first sales" is no accident of draftsmanship; it clearly parallels the legislative history. As explained in the House Report on the proposed legislation[9]:

Maximum Lawful Price—First Sale Concepts

> Part D establishes "maximum lawful prices" applicable to certain categories of "first sales" of natural gas under natural gas sales contracts. The Committee intends that the term "first sale" be applied by the Federal Power

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[7]

The precursor of the NPGA, President Carter's proposed National Energy Act, was transmitted to Congress April 29, 1977. It used the term "first sale" but did not define it. House Document No. 95-138, 95th Cong., 1st. Sess. (National Energy Act, Communication from the President of the United States, April 29, 1977). Section 2(21) did not make its initial appearance until July 31, 1978. Proposed Conference Report on the NGPA, July 31, 1978. The August 18, 1978 draft Conference Report contained the version ultimately adopted. Sen. Report No. 95-1126, 95th Cong., 2d Sess., August 18, 1978. Petitioners found the first version murky, the second crystalline. R. 1583.

[8]

See Attachment #1 to Appendix A.

[9]

H. Rep. 95-496, Part. 4, 95th Cong. 1st Sess. (1977), p. 103.

> Commission to the first transfer of natural gas for value in an arms-length transaction. *Therefore, the first sale price is essentially a wellhead price.* (emphasis added).

Indeed, the Report used "wellhead" as the functional equivalent of "first sale:"

> Thus, the Federal Power Commission is authorized to establish adjustments in the first sale (wellhead) price to compensate seller for the expenses • • •. *Id.*

That "first sale" does not include a pipeline's sales from its general system supplies is further demonstrated by Chairman Dingell's explanation of the conference bill. He referred to the statutory prices as "generally applicable to field sales • • •."[10] Obviously the pipeline's sales to customers (e.g., Consolidated selling offshore Louisiana gas to a Pennsylvania utility for resale to homeowners) are not "field sales" under any stretch of the imagination.

One of the central purposes of the NGPA pricing provisions was to eliminate the existing two market system (interstate and intrastate). Chairman Dingell stated (*Id.*):

> This legislation is intended to substitute a uniform natural gas pricing policy for the bifurcated system of regulation under the Natural Gas Act.

As the Commission explained, "[t]he resultant disparity between prices for producer sales in the interstate and the intrastate markets, which tended to discourage dedication of new production to interstate commerce, compelled Congress to eliminate the jurisdictional barriers to a nationwide market" (R. 3278).

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[10]
124 Cong. Rec. H13115, October 14, 1978.

A legal requirement that all pipelines be allowed to value natural gas sold from their general system supply by NGPA prices goes far beyond that remedial purpose. This lawsuit thus boils down to an attempt by the pipelines to cash in on a price schedule which Congress drafted for other purposes. Whatever might be appropriate as a discretionary matter, the Commission properly concluded that the new statute did not mandate any such sweeping entitlement as a matter of law.

To be sure, the Act envisions that some non-wellhead sales can be "first sales." But it does so only when necessary to protect the statutory pricing schedule against manipulations. As the Commission explained, certain preceding transactions are "first sales" to assure that "natural gas would be delivered to the market at NGPA prices, * * *" (R. 3278), no matter what middle steps might occur. See, *e.g.*, section 2(21)(A)(iv). Other non-wellhead sales are "first sales" only when the Commission so defines them "to prevent circumvention" of the NGPA price schedule. (Section 2(21)(A)(v)). These purposes would not be served by treating pipeline sales as "first sales."

Nor do the pipelines' legislative history arguments warrant any different result. They rely upon one line in the testimony of a Professor (a former FPC employee) who said that a pipeline's "producing divisions" would benefit from the pricing provision.[11] The Professor's other remarks triggered only hostile comment from several Representatives present at the hearing; no one supported him. His "divisions" reference was ignored.

There is no evidence that his views on this matter—or any other—were somehow endorsed by the legislative process.

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[11]

Hearings on H.R. 6381, *et al.* before the Subcommittee on Energy and Power of House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. Sec. 23, Pt. 2 (1977) at 894.

Indeed, he strongly opposed virtually all of the bill. In these circumstances, his "divisions" phrase is entitled to no weight. *Cf. Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394 (1951) ("[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.").

At one point, Chairman Dingell, said "any interstate gas for which a just and reasonable rate exists," is covered by section 104 of the NGPA.[12] Kentucky West (Br. 24), taking the statement out of context, argues that pipeline-produced gas had existing just and reasonable rates, and therefore the NGPA price schedule must cover it. That reference appears in Chairman Dingell's discussion of section 106 of the NGPA, dealing with "rollover" contracts, and is directed to the intricate workings of sections 104 and 106, and to the possibility that section 106(a) might be interpreted to "rollback" instead of "rollover" a section 104 price. We fail to see how this material could have any relevance to this case. Indeed, Section 106 is clearly inapplicable to pipeline production, because the pipeline does not buy gas under contract with itself, and there is, therefore, nothing to "rollover."

Lastly, Kentucky West Virginia cites one line from a document preceding the Conference Report (Br. 25): "Assure that there is no indirect or 'back door' producer regulation by FERC." This fragment, printed as a sentence, has neither a subject nor any clear meaning. Moreover, nothing in its context suggests that the "back door" notion somehow mandates NGPA prices for pipelines' general sales. There is no basis for the assumption that the regulations in issue amount to improper "back door" regulation at all—let alone whatever the conferees' draftsman may have had in mind. Indeed, the document's reference in the next paragraph to "an affiliated producer" suggests that whatever the fragment meant, it did not reach pipeline production.

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[12]
124 Cong. Rec. H13118, October 14, 1978.

c. Policy Considerations.

These rules, which leave pipelines' general sales where they were before the NGPA, are consistent with the statute's general approach to pipeline regulation, an approach which preserves the existing regulation of pipeline services and rates. As the Commission explained, "Congress left substantially intact the regulatory apparatus for determining just and reasonable rates applicable to sales of gas acquired and transported by interstate pipelines" (R. 3279).

Where Congress chose to depart from this general framework, it did so carefully and explicitly through certain express statutory exceptions. The provisions containing these exceptions specifically set out the ways in which Congress intended to alter the existing regulation of interstate pipelines under the NGA, and of intrastate pipelines under state law.[13]

This general arrangement—preserving pipeline regulation under the NGA and state law except where specifically changed—is entirely consistent with the Commission's regulations in issue here.

But as the Commission discussed (R. 3292), the interstate pipeline petitioners' interpretation would cause significant changes in pre-existing federal and state regulatory schemes. The interstate pipelines would have the new statutory provisions apply to ordinary pipeline sales to the extent the fraction of "the sale" was traceable to their own production. This would require dividing each otherwise routine pipeline sale into two parts: gas purchased by the pipeline from others, and gas which the pipeline itself produced.

This dichotomy would create dual regulation. Purchased volumes sold would continue to be regulated under the NGA

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[13] See, *e.g.*, sections 311 and 312 of the NGPA, 15 U.S.C. §3371-72.

while volumes "attributable" to pipeline production would be governed by the new statute. Each "sale" would have two pricing increments. Meanwhile, interstate pipelines having no production would continue to be regulated exclusively under the NGA. There is nothing in the NGPA to suggest Congress' schedule of "wellhead prices" or "field sales," was somehow intended to alter NGA regulation of interstate pipelines and create this complex statutory patchwork.[14]

The pipeline's interpretation could also require different methods for setting a transportation rate for carrying the same volume of gas. The portion of the service reflecting volumes purchased from others could be priced by traditional cost-of-service methods. That portion reflecting the pipelines own production would involve Section 110 of the NGPA which permits an allowance for certain costs. This duality could, as the Commission noted, create a needless increase in the administrative burden, both on interstate pipelines and the Commission. R. 3294. Nothing in the statute or the legislative record requires this result.

Under the Commission's rules, production by intrastate pipelines and local distribution companies continues subject to state regulation except in the unusual circumstance where the sale consists of volumes "exclusively comprised" of their own production. But under the interstate pipelines' interpretation,

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[14]

The pipelines' view creates an even further anomaly—shifting some regulation from state to federal authorities. Under the NGA, jurisdiction over the price terms of direct sales from pipelines to end-users was left to the states. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947). Under section 270.203, direct sales would be first sales only if they meet the "comprised exclusively" test of section 203(a). In the typical case, however, these sales would continue to be subject to state regulation pursuant to section 270.203(b). Under the interstate pipeline petitioners' interpretation, a part of each such pipelines' direct sales would now be subject to federal regulation.

these sales, to the extent of an intrastate pipeline or local distribution companies' "own" production, would be subject to federal regulations. In the case of local distributors, this would mean that sales to the individual homeowner would, to some extent, be governed by the NGPA.

Such a result would intrude on the regulatory division existing for over 40 years, whereby local distribution companies' retail sales are regulated by states. If this invasion into the historic preserve of the states had been intended, surely the extensive Congressional consideration of the legislation extending over one and one-half years would have reflected this landmark change. The Commission properly concluded that Congress had not silently intended this major alteration of traditional state-federal relations.

Congress knew how to impose federal regulation on previously state-regulated areas when it wanted to do so. It did just that in explicitly eliminating the intrastate market for field or wellhead sales. Its contrasting silence as to local gas company's retail sales cannot be converted into preemption of traditional state domain.

The Commission's construction avoids these bizarre results, and is consistent with the language, legislative history, and basic contours of the NGPA. Under familiar principles (see authorities cited, *supra*), these agency regulations should be affirmed.